In The

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-1188

PETER V. KEILEY,

Petitioner,

vs.

ELBERT HINKSON, ABRAHAM D. BEAME and HARRISON J. GOLDIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL E. PERSON and
WALTER C. REID
Attorneys for Petitioner
c/o Carl E. Person
132 Nassau Street
New York, New York 10038
(212) 349-4616

(9237)

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The petitioner, Peter V. Keiley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this action on November 21, 1975.

OPINION BELOW

The opinion of the District Court for the Southern District of New York (Wyatt, J.), dated April 3, 1975, is not reported. It is reproduced in Appendix A to this petition. The Court of Appeals for the Second Circuit did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was rendered and entered on November 21, 1975, and a copy thereof is appended to this petition in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The New York City Parking Violations Bureau ("PVB"), operating since 1972 under a New York statute, has the statutory duty of raising revenues for New York City through its employees who issue summonses and adjudicate alleged violations of New York City parking regulations, and assess and collect fines and penalties which, upon default, become alleged "judgments." These "default judgments" are allegedly entered in the Civil Court of the City of New York ("Civil Court"). The fines and penalties, not to exceed $50 per parking violation, are established by the PVB irrespective of the costs of enforcement of the parking regulations. New York City is deriving many tens of millions of dollars of net revenues per year, after related expenses, from its enforcement of the parking regulations. The PVB is being run as a profit-making business for New York City at a time when other governmental activities of New York City are being substantially curtailed. The PVB turns over 100% of

the fines and penalties it collects to New York City to be used for general purposes. PVB regulations prohibit any appeals from "default judgments" six months after entry of a "default judgment" against an alleged violator and the regulations do not require any notice of entry of the "default judgments," nor is any notice given. Also, the regulations specifically prohibit an alleged violator from opening up a "default judgment" if his claimed justification for the default is that he did not receive the summons, even though he otherwise has a valid defense. Petitioner applied to the Civil Court to open up approximately 50 alleged "default judgments," amounting to an aggregate of $1,980 in fines and penalties, and was advised by the court to seek any available relief from the PVB itself. The PVB regulations, however, denied petitioner any remedy. The questions presented here are:

1. Whether petitioner was entitled to the convening of a three-judge court to determine the constitutionality of the New York statute establishing the PVB under the test of the Supreme Court set forth in *Hagans v. Lavine*, 415 U.S. 528 (1974).

2. Whether under the Due Process Clause a local government may raise substantial net revenues (after related expenses) through the exercise of its police power to regulate parking.

3. Whether under the Supreme Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the PVB denied due process to petitioner by adjudicating parking offenses against petitioner when the PVB had a direct and substantial pecuniary interest in reaching a conclusion against him.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, the Due Process Clause, provides in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The statute providing jurisdiction for the District Court, 28 U.S.C. §1343, provides in pertinent part as follows:

> "§1343. Civil rights and elective franchise
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

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> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for protection of civil rights, including the right to vote."

The statutes providing for the convening of a three-judge court to determine the constitutionality of state statutes, 28 U.S.C. §§2281 and 2284, provide in pertinent part as follows:

> "§2281. Injunction against enforcement of State statute; three-judge court required
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.
>
> §2284. Three-judge district court; composition; procedure
>
> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and

procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

* * *

(5) . . . A single judge shall not . . . enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing. . . ."

The statute authorizing petitioner to sue for denial of his civil rights, 42 U.S.C. §1983, provides in pertinent part as follows:

"§1983. Civil Action for deprivation of rights

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Article 2-B of the New York Vehicle and Traffic Law, "Adjudication of Parking Infractions," provides in pertinent part as follows:

> "§236. Creation, personnel
>
> 1. Creation. In any city as hereinbefore or hereafter authorized such tribunal when created shall be known as the parking violations bureau and shall have jurisdiction of traffic infractions which constitute a parking violation. . . .
>
> §237. Functions, powers and duties
>
> The parking violations bureau shall have the following functions, powers and duties:
>
> 1. To accept pleas to, and to hear and determine, charges of parking violations;

2. To provide for penalties other than imprisonment for parking violations in accordance with a schedule of monetary fines and penalties, provided however, that monetary penalties shall not exceed fifty dollars for each parking violation;

3. To adopt rules and regulations not inconsistent with any applicable provision of law to carry out the purposes of this article, including but not limited to rules and regulations prescribing the internal procedures and organization of the bureau, the manner and time of entering pleas, the conduct of hearings, and the amount and manner of payment of penalties;

* * *

5. To enter judgments and enforce them, without court proceedings, in the same manner as the enforcement of money judgments in civil actions in any court of competent jurisdiction or any other place provided for the entry of civil judgment within the state of New York;

6. To compile and maintain complete and accurate records relating to all charges and dispositions and to prepare complete and accurate transcripts of all hearings conducted by the bureau and to furnish such transcripts of all hearings conducted by the bureau and to furnish such transcripts to the person charged at said

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person's own expense upon timely request, and upon said person complying with the regulations of the bureau;

7. To remit to the finance administrator or other appropriate finance officer, on or before the fifteenth day of each month, all monetary penalties or fees received by the bureau during the prior calendar month, along with a statement thereof, and, at the same time, to file duplicate copies of such statement with the comptroller;

8. To answer within a reasonable period of time all relevant and reasonable inquiries made by a person charged with a parking violation or his attorney concerning the notice of violation served on that person. The bureau must also furnish within a reasonable period of time to the person charged on his request, and upon complying with the regulations of the bureau, a copy of the original notice of violation including all information contained thereon . . . .

9. To prepare and issue a notice of violation in blank to members of the police department, the fire department, the traffic department and to other officers as the bureau by regulation shall determine. The notice of violation or duplicate thereof, when filled in and sworn to or affirmed by such designated officers, and served as provided in this article, shall constitute notice of the parking violation charged.

§238. Notice of Violation

1. . . . Such notice of violation shall also contain a warning to advise the person charged that failure to plead in the manner and time provided shall be deemed an admission of liability and that a default judgment may be entered thereon. . . . The original or a facsimile thereof shall be filed and retained by the bureau, and shall be deemed a record kept in the ordinary course of business, and shall be prima facie evidence of the facts contained therein....

§241. Final determinations, judgments

1. The hearing examiner shall make a determination on the charges, either sustaining or dismissing them. . . .Final determinations sustaining or dismissing charges shall be entered on a final determination roll maintained by the bureau together with records showing payment and nonpayment of penalties.

2. Where an operator or owner fails to enter a plea to a charge of a parking violation or fails to appear on a designated hearing date or subsequent adjourned date or fails after a hearing to comply with the determination of a hearing examiner, as prescribed by this article or by rule or regulation of the bureau, such failure to plead, appear or comply shall be deemed, for all

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purposes, an admission of liability and shall be grounds for rendering and entering a default judgment in an amount provided by the rules and regulations of the bureau. However, after the expiration of the original date prescribed for entering a plea and before a default judgment may be rendered, in such case the bureau shall pursuant to the applicable provisions of law notify such operator or owner, by such form of first class mail as the commission may direct; (1) of the violation charged, (2) of the impending default judgment, (3) that such judgment will be entered in the Civil Court of the city in which the bureau has been established, or other court of civil jurisdiction or any other place provided for the entry of civil judgments within the state of New York, and (4) that a default may be avoided by entering a plea or making an appearance within thirty days of the sending of such notice. Pleas entered within that period shall be in the manner prescribed in the notice and subject to such additional penalty or fee as the bureau may by rule or regulation determine. Such notice of impending default judgment shall not be required prior to the rendering and entry thereof in the case of operators or owners who are non-residents of the state of New York. In no case shall a default judgment be rendered or, where required, a notice of impending default judgment be sent, more than two years after the expiration of the time prescribed for entering a plea."

Regulations of the Parking Violations Bureau (the "PVB entitled "Manual for Adjudication," Chapter 17 — "Commerc Adjudication Unit, Office of Judgments and Executio Appeals Board," provide in pertinent part as follows:

"17.1 *Commercial Adjudication Unit (CAU)*

This unit handles hearings and payments concerning summonses issued to commercial operators and individuals with multiple summonses. . . .

The hearing procedure followed in the CAU is basically the same as in all hearing rooms with the exception that the respondent is required to enter all summons and docket numbers and scheduled fines therefor on the log sheets in advance. . . .

The respondent may then proceed with his case, taking each summons separately or as they more often do by stating a blanket defense or explanation to cover all summonses. . . .The Hearing Examiner then weighs and evaluates everything on the record and announces his decisions. . . .

§17.3 *Office of Judgments and Executions (O.J.E.)*

If a judgment debtor wishes to contest a judgment he must make a motion to vacate it at

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the Office of Judgments and Executions. This motion must be made within six months of the rendering of the judgment by P.V.B. . . . .

For the motion to be granted, the respondent must show, both; (1) excusable or justifiable neglect concerning his failure to comply with the Rules and Regulations of the Parking Violations Bureau and (2) a substantial defense to the charge, for each of the particular summonses whose judgments he wishes vacated . . . .

When a judgment debtor, states he wishes to make a motion to vacate the judgments against him he should be furnished with a 'Motion to Vacate Judgment' form to complete and log sheets on which to copy all summons and docket numbers and amounts due, that appear on his judgment register.

He should be advised that he will be required to furnish copies of all summonses shown on his Judgment Register and that if he does not have them he should order microfilm copies immediately. The Judgment Debtor must pay $1.00 for each microfilm copy ordered.

When he has completed the 'Motion to Vacate Judgment' form and log sheets he should file them with the summonses at OJE. Initially

the above documents will be screened by a Hearing Examiner in one of the hearing parts without the respondent being present. . . . Those motions which on their faces obviously do not meet both required grounds will (be) denied summarily and the judgment debtors shall be so notified. Those motions where the written statement appears to substantially meet both grounds, subject to later proof, shall be scheduled for hearings . . . .

When a case is called for hearing, the judgment debtor enters the room and the file is placed before the Hearing Examiner. In the file are at least three copies of the latest judgment register of the respondent who is making the motion to vacate, showing all open judgments against him, the 'Motion to Vacate Judgment' form, the log sheets prepared by the judgment debtor and hard or microfilm copies of all summonses on the judgment register.

. . . In cases where judgments are vacated the vacatur is conditional only. The entire amount due at the commencement of the hearing remains due on PVB records until the respondent has had dispositions on the merits on all summonses on which the Motion was granted and has paid the amount due as fixed by these dispositions plus the amount due on all judgments on which the Motion was denied, less the amount of any

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mathematical errors on the judgment register or uncredited payments as proven above. . . .

. . .If the respondent does not pay the total of this amount plus the amount due on the judgments that were not vacated, within seven days, the conditional granting of the motion is automatically recalled and rescinded, the motion is denied and the total amount originally shown on the judgment register less the amount of any mathematical errors or uncredited payments, remains in effect. . . .

17.4 *Substantive Aspects of the 'Motion to Vacate Judgments'*

17.4(a) *Grounds for Excusable or Justifiable Neglect*

It does not constitute excusable or justifiable neglect nor is it acceptable to state: . . .

'I never received the summonses and/or the notices'. . . .

'I called PVB when I received the notices and was told not to worry, or was told to come in when I get the chance'. . . .

'I moved and didn't receive my mail'. . . .

The above excuses are analyzed below and the following flaws develop.

. . .The very fact that these individuals have run up the number of summons they have and have done nothing about ever answering them is indicative of a lack of desire to meet the responsibilities imposed on every owner and/or operator by Vehicle and Traffic Law and the Traffic Regulations.

. . .you may take 'Judicial Notice' of the fact before a judgment is entered against the owner of a New York vehicle, in addition to the summons, two notices are sent to the registered owner by mail. The mere mailing of these notices constitutes notice to the owner and PVB does not have to prove he received them. They are sent to the same address as shown on the vehicle's registration and it should be noted, to the same address where the judgment certification or notice of withholding of registration, that the individual is obviously finally responding to, was sent.

This also negates the excuse that the party moved or changed his address since under the VTL he is responsible for notifying the Department of Motor Vehicles of the change and in addition a reasonable man would also notify the Post Office to forward his mail to the new address.

It is absurd for a person with multiple summonses to claim he didn't receive any of

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them. This may be plausible in the case of 2 or 3 summonses but beyond this it stretches the bounds of credibility. In addition, we know that at least 2 additional notices are sent by mail before judgment is entered.

The person who states he phoned PVB and was told not to worry or to come in when he can, again stretches credibility. In addition, even if he were to be believed, the coming in months later and then only after receiving notice that his registration is being withheld is not reasonable nor excusable.

What type of situation may be reasonable, excusable or justifiable?

Where an individual can prove by valid evidence such as hospital records, travel records, etc. that he was hospitalized, out of the country, or at least 500 miles away from New York City for an uninterrupted period during which the summonses and notices were issued, this may be accepted as valid satisfaction of the requirement for excusable, reasonable or justifiable neglect. . . .

17.4(b) *Substantial Defenses to the Charge*

The spectrum of defenses is as wide as the spectrum of the charges they apply to. We have

learned from our experience in the hearing parts what defenses are valid and what defenses are not. Again, in determining if an applicant meets this requirement, we must see if the defense holds up to the credibility test and if it is supported by valid proof in the form of testimony under oath and tangible evidence. To show that he meets the requirement of a meritorious defense a party must demonstrate that with his defense he has a good chance of prevailing (being found not liable or not guilty) if a hearing were held.

This, therefore, eliminates all of the alleged defenses that are really only explanations in mitigation e.g., 'I was only there for 2 minutes'. 'I didn't have the change for the meter', 'I had to go to the bathroom and similar excuses, as well as the alleged defenses that are not credible or can not be proven because of a lack of sufficient evidence. See Chapter 11, *supra,* on 'Defenses'."

Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure provide in pertinent part as follows:

"*How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . .(6) failure

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> to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56(f) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "*When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT

The case originated upon the filing of a complaint in the District Court for the Southern District of New York to recover refunds for tickets previously paid and to enjoin enforcement of the alleged "default judgments" against petitioner, allegedly

entered against petitioner pursuant to Article 2-B of the New York Vehicle and Traffic Law. Petitioner alleged a violation of his civil rights under 42 U.S.C. §1983 and commonlaw fraud, and alleged that the basis for jurisdiction was 28 U.S.C. §1343 and pendent jurisdiction as to the fraud count.

The PVB is an administrative agency of New York City established pursuant to Article 2-B of the New York Vehicle and Traffic Law, a statute having statewide application. (Actually, the PVB was established initially under Chapter 40, Title A of the New York City Administrative Code, but Article 2-B of the New York Vehicle and Traffic Law preempted the local law effective July 29, 1972.) Revenue collected from alleged violators of parking regulations are paid by the PVB directly to New York City's finance administrator or other finance officer and a copy of the statement is sent each month to the finance administrator or other finance officer and to the Comptroller of New York City, pursuant to §237(7) of the Vehicle and Traffic Law. The revenues amount to many tens of millions of dollars each year in excess of the expenses incurred by New York City or the PVB in enforcing the parking regulations. The PVB is run by respondents as a highly profitable money-making business for the benefit of New York City, and the profits are increasing with stepped up enforcement and collection procedures, involving computers, compacts with cities in other states, fleets of enforcement vehicles, 500,000 liens filed against real property, collection agencies, seizing people's homes and cars, garnishment of salaries, dunning letters, 300,000 New York state residents certified as "scofflaws," 22-30% of the judgments to collection agencies, 20,000 "scofflaws" added to the list each month; police cars equipped with computers to aid in seizing cars registered in the name of "scofflaws," increased hiring of uniformed personnel

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to issue tickets, non-renewal of registrations, fleets of tow trucks and scooters, computerized court records admittedly inaccurate, to name only some of the evils and indignities brought about by New York City's desire to build a profitable business of assessing "fines and penalties" against alleged violators of New York's stringent parking regulations. Respondents are the Director of the PVB (Hinkson), the Mayor of New York City (Beame) and the Comptroller of New York City (Goldin). Each of the respondents has the duty of raising substantial net revenues for New York City.

Petitioner was notified by a New York City marshal that the PVB had obtained "default judgments" in the amount of $1,980 against petitioner in the Civil Court and that, if these "judgments" were not paid, petitioner's salary would be garnisheed and his property sold to satisfy the alleged judgments. Petitioner believed that he had previously paid a substantial part of the amount demanded; and petitioner, a skilled investigator, made a vigorous effort to locate these alleged judgments in the Civil Court, but was unable to do so. (Later, after commencement of this action, his attorneys found out that the record of "judgments," consisting of an inaccurate computer printout, was stored in a room over the PVB's office and called an "annex" to the Civil Court, even though it had no telephone listing or signs visible to inquirers.) Petitioner therefore made application, by order to show cause, in the Civil Court to vacate the alleged judgments, but the Civil Court refused to sign the order to show cause on the ground of an existing memorandum of the Administrative Judge of the Civil Court (see Appendix C), which directed all judges and clerks of the Civil Court to deny summarily all applications for relief from any judgments in favor of the PVB, and stated that the

applicants should be directed to return to the PVB for any relief. The memorandum further stated that these PVB judgments were not judgments of the Civil Court, and that the PVB was allowed to use the name of the Civil Court solely to aid the PVB in collection of the alleged judgments. See Appendix C for a copy of the memorandum. Upon returning to the PVB, petitioner was told that he would have to pay the alleged judgments and any other outstanding PVB "judgments" he may have had, as well as $1 for a copy of each of the 50 summonses he could not produce as a condition to the PVB hearing any motion by petitioner to vacate the PVB "judgments." The rules of the PVB ("Manual for Adjudication") provide that an application to open up a PVB "judgment" must be made within 6 months of entry of the "default judgment" and that in any event an application based on alleged non-receipt of a summons must be summarily denied. Therefore, petitioner had no remedy either in the Civil Court or the PVB.

Thereafter, petitioner commenced this action against respondents (who are officials of the PVB and New York City) to have the relevant portions of Article 2-B of the New York Vehicle and Traffic Law declared unconstitutional and the alleged default judgments vacated, and to recover for prior tickets paid. Petitioner moved for the convening of a three-judge court and defendants cross-moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner sought discovery under Rule 56(f) of the Federal Rules of Civil Procedure, but the request was denied, and petitioner's request for the convening of a three-judge court was also denied. Instead, the District Court rendered a summary judgment against petitioner dismissing the action.

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During oral argument, the PVB admitted that the "judgments" in question (referred to in the "Manual for Adjudication" as the "judgment register") were only computer printouts, which petitioner contended did not comply with numerous New York court and statutory rules relating to the rendering, entry and enforcement of default judgments. The computer printout drops out paid "judgments," eliminating any record of such judgments, and the computer printout fails to record satisfactions of judgments for long periods or forever. These "judgments" are adversely affecting titles to real property in and out of the state of New York, including the title to petitioner's home in Queens, New York, and the PVB has been enforcing these "judgments" in other states under the Full Faith and Credit Clause. The number of liens filed appears to exceed 500,000 as of November, 1974, the number docketed in the County Clerk's Office in New York County, and the number of "judgments" appears to be in the millions, based on a minimum of 3 tickets per lien (to achieve "scofflaw" status) and the more than 7.5 million tickets issued during 1974 alone.

Although the District Court ruled that "even if it were found that plaintiff had shown some evidence of deprivation amounting to a denial of due process, the multiplicity of technical questions arising as to the requirements of New York law for the form, content and timing of the entry of judgments by state courts make this case uniquely appropriate for abstention by a federal district court" (p. 21). No three-judge court passed on the issue of abstention. The opinion did not mention the question of the legality of New York City deriving substantial net revenues on its exercise of the police power (p. 14 of the complaint), even though petitioner briefed the issue in both courts below. Petitioner appealed to the Second Circuit,

and the judgment was "affirmed on the opinion of Judge Wyatt, dated April 3, 1975" on November 21, 1975.

REASONS FOR GRANTING THE WRIT

We submit that this Court should grant this petition for the following reasons:

1. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court: *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

2. The Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings under the principles set forth in *Hagans v. Lavine*, 415 U.S. 528 (1974) as to call for an exercise of this Court's power of supervision.

3. The issues affect tens of millions of persons in various cities throughout New York State (New York, Yonkers, Buffalo) and perhaps in many cities throughout the country where they are being taxed by local government irrespective of their ability to pay based upon alleged parking violations (the tax amounting to the difference between the penalties assessed and the pro rata cost of enforcement of the parking regulations).

4. The use of the judicial branch of government to raise substantial revenues after related expenses for a local government demeans the judiciary and breeds contempt for the whole judicial process.

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5. The sums of money involved in New York City alone amount to many tens of millions of dollars per year, and appear to be approaching $100,000,000 per year.

The PVB is an administrative agency which claims the power to render and enforce judgments relating to parking violations. These "judgments" are being given extra-territorial effect through the Full Faith and Credit Clause, and the PVB admittedly works with officials in other states (New Jersey, for example) to enforce unpaid "default judgments" allegedly rendered and entered against the citizens of such other states. The judgments are issued in the name of the Civil Court. Executions on real and personal property in New York are handled by sheriffs and city marshals under process allegedly issued out of the Civil Court. However, the Civil Court does not have the underlying records of these "judgments" and when the same judgments were legally challenged, in this case, the petitioner's motion was summarily denied on the ground that the Civil Court had no underlying records relating to the judgments (see Appendix C). The petitioner was then sent back to the PVB (an administrative agency) which by its rules ("Manual for Adjudication") required that such application not be entertained beyond six months of entry of a PVB judgment (no notice of entry being made or required to be made) and that in any event the claim that petitioner never received any of the summonses in question is held, by the PVB, as a matter of law, to be insufficient to open a PVB judgment in order to allow a defense on the merits.

The enormous gross revenues (approaching $100,000,000 annually) collected by the PVB are paid directly to the City of New York (which also pays for all PVB activities) which

therefore has a vested interested in securing convictions fo parking violations. The entire statutory scheme is clearl violative of this Court's holding in *Tumey v. Ohio*, 273 U.S. 51 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972 which held, in substance, that it is a denial of due process for municipality to adjudicate offenses and levy fines thereupo where it has a direct and substantial pecuniary interest in s doing.

Moreover, the enormous sums involved bear no reasonabl relationship to the cost of exercise of enforcement of the parkin regulations in question but are in fact a "back-door" taxin device. Petitioner maintained below in both courts that th amounted to a denial of due process in the taking of h property.

CONCLUSION

For the foregoing reasons, this petition for a writ c certiorari should be granted.

Respectfully submitted,

s/ Carl E. Person
s/ Walter C. Reid
Attorneys for Petitioner

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APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETER V. KEILEY,

Plaintiff,

-against-

ELBERT HINKSON, etc., et al.,

Defendants.

74 Civ. 5075

APPEARANCES:

CARL E. PERSON, ESQ.
WALTER C. REID, ESQ.
Attorneys for Plaintiff
132 Nassau Street
New York, New York 10038

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Attorney for Defendants

Appendix A — Opinion of the United States District Court For the Southern District of New York

EDWARD J. MALLON, ESQ.
ELLIOT R. PRESS, ESQ.
PATRICK J. ROONEY, ESQ.
Of Counsel

WYATT, District Judge.

This is a motion by plaintiff to convene a three-judge court pursuant to 28 U.S.C. § 2281 and following, and a motion by defendants to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), (6). Since both sides have submitted affidavits, the motion of defendants to dismiss will be treated as one for summary judgment, Fed. R. Civ. P. 12(b), 56, and is granted for the reasons which follow. The motion of plaintiff for the convening of a three-judge court is denied.

Plaintiff commenced this action on November 19, 1974. On November 25, 1974 he served by mail an amended complaint and a notice of motion for the convening of a three-judge court. Defendants' time to answer has been extended by stipulation until the determination of the present motions. The defendants served on plaintiff their motion to dismiss the complaint on January 24, 1975. Oral argument was heard in open Court on January 31, 1975, the return date of both motions.

I. The Action

Plaintiff is a resident of Queens County, New York, and bases his action on 28 U.S.C. § 1983. He claims in essence (see

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section 3 below) that defendants have deprived him of constitutional rights by enforcement of an allegedly invalid New York statutory scheme for the collection and enforcement of parking violation judgments. Default judgments aggregating $1980 are presently outstanding against plaintiff. The three defendants are Hinkson, Director of the Parking Violations Bureau of the City of New York, Beame, Mayor of the City of New York, and Goldin, Comptroller of the City of New York. Jurisdiction is predicated on 28 U.S.C. § 1343(3). Venue lies in the Southern District because all defendants are resident herein. 28 U.S.C. § 1391(b).

2. Background

It is necessary to set forth at length the procedure established by the New York Legislature for the administrative determination of parking violations before its alleged constitutional defects may be understood.

Prior to July 1, 1970, the Criminal Court of the City of New York had statutory jurisdiction to adjudicate traffic infractions. New York Vehicle and Traffic Law §§ 1800 and following (McKinney 1970). That burdened court processed in 1969 approximately 3 million summonses. Hinson affidavit, p.2

Recognizing this burden, the New York Legislature amended (effective July 1, 1970) section 155 of the Vehicle and Traffic Law to authorize the creation of an administrative bureau in cities having a population of one million or more

persons to hear and determine "traffic infractions", which were declared no longer to constitute crimes. Laws of 1969, Ch. 1075, approved May 26, 1969 That same act amended (also effective July 1, 1970) Chapter 40 of the Administrative Code of the City of New York (N.Y.C. Admin. Code) to create a Parking Violations Bureau (PVB) in the Department of Traffic. In 1972, the New York Legislature further amended (effective July 30, 1972) the Vehicle and Traffic Law by adding a new Article 2-B (Veh. & Traff. Law §§ 235-44) which sets forth the procedure to be followed by administrative bureaus in adjudicating "traffic infractions constituting parking, standing or stopping violations." Laws of 1972, Ch. 715, approved May 30, 1972. The procedures substantially conform to those which the Legislature had in 1970 established for the PVB.

A person who commits a parking violation (a violator) is served (by affixation to his vehicle) with a summons (a "notice of violation"), which states that he must appear within seven days before the PVB to schedule a hearing or plead by mailing the "plea form" to the PVB within 7 days of the date of issuance of the summons. If the violator fails to take either step, the PVB sends to him a notice, not required by statute, three weeks from the date of issuance of the summons. Hinkson affidavit, p.5. The notice advises him of the violation and of the consequences which may follow from default, which are the entry of a default judgment and the assessment of penalties (additional to the fine for the parking violation itself). By statute, the total monetary penalty for each violation may not exceed $50. N.Y.C. Admin. Code § 833a-3.0(b). If the violator continues not to appear or

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plead, a "final notice of impending default judgment" is sent to the violator three weeks from the date of sending of the prior notice. This second notice is required by statute. N.Y.C. Admin. Code § 883a-7.0(b); Hinkson affidavit, p.5. The second notice contains essentially the same statements as the prior notice and advises the violator that he may avoid default either by payment or by pleading in person within 30 days of the date of the notice. The form of notice states that the failure to plead or appear timely results in a $5 to $10 penalty additional to the fine for the violation itself. Neither may a default judgment be rendered nor may a notice of a default judgment be sent "more than two years after the expiration of the time prescribed for entering a plea or making an appearance." N.Y.C. Admin. Code § 883a-7.0(b)

The "rendering" of a default judgment is an act which is different from the "entry" of a default judgment. The former apparently refers to the recordation by the PVB of the violator's default after his failure to respond to the second notice of default. See defendants' Supplemental Affidavit (filed February 5, 1975), p.2, and the Hinkson affidavit, p.6, para 18 and p.7, para 23; see also 5 Weinstein Korn & Miller, paras 5016.01-.04 The latter refers to the entering of the judgment by the Clerk of the Court in the civil docket of the Court. See Fed. R. Civ. P. 79(a) for the federal practice.

If a violator wishes to plead not guilty or guilty with an explanation, he receives a hearing conducted by a hearing examinor of the PVB. See generally, N.Y.C. Admin. Code § 883a-6.0 The examiner is not bound by the rules of evidence

except for the rules for privileged communications. N.Y.C. Admin. Code § 883a-6.0(3) In his discretion or at the request of the person charged, the examiner may compel by subpoena the attendance of witnesses. N.Y.C. Admin. Code § 883a-6.0(4) The statute provides for appeal to the PVB Appeal Board and for judicial review of an order of that body by the New York Supreme Court in an Article 78 proceeding. Civil Practice Law and Rules (CPLR) § 7801 and following. The standard for review of the evidence on which the examiner based his decision is a preponderance of the evidence, N.Y.C. Admin. Code §883a-6.0(2), and not merely substantial evidence.

If a violator defaults, the PVB may enter and enforce judgments "without court proceedings in the same manner as the enforcement of money judgments in civil actions". N.Y.C. Admin. Code § 883-3.0(e) The Vehicle and Traffic Law (§ 237(5)) adds: ". . . in any court of competent jurisdiction or in any other place provided for the entry of civil judgments within the state of New York". The procedure which is followed by the PVB for the enforcement of default judgments must be taken for present purposes from the statute, from the affidavit of defendant Hinkson, from the confusing explanations of counsel at the hearing of these motions, and from supplementary affidavits submitted by both parties after that hearing.

After a violator has defaulted, the PVB makes a record of the default. It does so by storing, in a computer, information as to each default: the name of the violator, his address, the license number of the offending vehicle, the summons number, its date

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of issuance, the total amount of the fine and penalty, and a judgment and docket number. At the end of an unspecified period, the computer is caused to print out a list of default judgments on a document called a "Judgment Register". See Hinkson affidavit, p.6 and Exhibit F annexed to defendants' memorandum of law. The list is compiled in such a manner that the judgments are listed after the name of each violator; violators are listed alphabetically by last name.

When the defaults have been recorded and printed out by the PVB computer, as described above, the printouts are filed with the Clerk of the Civil Court of the City of New York (the Civil Court) pursuant to N.Y.C.Admin.Code § 883a-3.0(e) Thus, a computer printout dated August 13, 1971 which shows default judgments against plaintiff and others was filed with the Clerk of the Civil Court on November 1, 1971. It constitutes the judgment roll and judgment. These printouts are apparently stored in books in an office of the Clerk of the Civil Court. See affidavit of Eugene St. Louis (annexed to affidavit by plaintiff filed January 30, 1975) pp. 3-5

The computer used by the PVB is programmed in such a way that each periodic printout generated by the computer and filed with the Clerk of the Civil Court shows every default judgment listed on the prior printout if that default judgment has not been paid in the period prior to the generation of the subsequent printout. If a judgment listed on the prior printout has been paid before the generation of the subsequent printout, that judgment is erased from the computer and it does not

appear on the subsequent printout. Exhibit G annexed to defendants' memorandum of law shows such a computer printout dated November 22, 1972 and apparently filed with the Clerk of the Civil Court on March 14, 1973. Hinkson affidavit, p.6 It incorporates the unpaid default judgments of plaintiff shown on the Judgment Register filed on November 1, 1971. Apparently the PVB now no longer files printouts such as Exhibit F, but periodically files only a printout such as Exhibit G. See St. Louis affidavit, pp. 3-4

The PVB also apparently maintains a "Scofflaw Certification", which is also a document periodically printed out by computer and which lists all the default judgments of violators. This document is used by the PVB to certify to the Commissioner of the Department of Motor Vehicles those violators who have failed to comply with the rules and regulations of any administrative body with respect to three or more summonses. Veh. & Traff. Law § 514.4(a) This document it is represented (affidavit of Elliot Press, filed February 5, 1975, p.1), contains under the name of each violator *all* default judgments, paid and unpaid, of that violator and shows on its face the amount of each judgment and the amount, if any, paid by the violator on each default judgment. This "Scofflaw Certification" is apparently normally filed with the Clerk of the Civil Court. See Exhibit 1 annexed to defendants' supplemental affidavit which was filed on December 19, 1973 and which shows these judgments as of December 5, 1973. However, Exhibit 1 does not contain all judgments paid and unpaid since the commencement of the operation of the PVB on July 1, 1970.

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The first five and the seventh judgments on Exhibit F do not appear on Exhibit 1, presumably because they were paid prior to the date (December 5, 1973) of the printout. As to two other judgments which do appear on both Exhibits 1 and F, the amount of partial payment is shown. Presumably at some point the PVB changed its form of "Scofflaw Certification" from showing only outstanding and unpaid judgments to showing all judgments and also the amount paid as to each judgment.

In addition, the PVB maintains a "Summons Status" computer printout (Exhibit 2 annexed to the Press affidavit) which shows only those judgments outstanding against a violator. There is no indication that this document is filed with the Clerk of the Civil Court. It seems however to be an updated (December 9, 1974) version of the "Scofflaw Certification" filed with the Clerk of the Civil Court.

3. Plaintiff's Claims

The amended complaint contains a demand for a jury trial, sets forth class action allegations, and is subdivided into four counts.

The first count avers that the defendants and their agents have pursued "a governmental policy, practice, custom and usage which unlawfully deprived plaintiff of [his] constitutional rights, in violation of § 1983 of the Civil Rights Act." The unlawful conduct is said to consist first in defendants' enforcement against plaintiff of default judgments entered on the

dockets of the Civil Court of the City of New York beyond the statutory period for rendering and entering such judgments. Secondly, the default judgments are said to be "non-existent and or non-enforceable" irrespective of whether rendered within the statutory period.

The second count avers that defendants fraudulently induced plaintiff to pay "approximately $1000 in non-existent and or unenforceable 'judgements'". This count is said to be pendent to the other causes of action.

The third and fourth counts allege, as does the first, that defendants deprived plaintiff of his constitutional rights in violation of 42 U.S.C. § 1983. The unlawful conduct averred in the third count is the assessment by the PVB of one or more penalties, additional to the amount assessed as a fine for the violation itself, for failure to appear or plead or to respond to a default notice within the times designated by statute. The allegation of the fourth count is that administrative decisions are "given the effect of judicial judgments . . . without the safeguards provided by the courts of New York State and New York City."

Plaintiff seeks declaratory and injunctive relief, an order permitting him to represent the class of person who, between November 20, 1968 and November 19, 1974, "paid one or more New York City parking tickets more than two years after the expiration of the time prescribed for entering a plea or making an appearance", the convening of a three-judge court, and a

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refund of "all amounts collected (from November 20, 1968 to November 19, 1974) by defendants." Plaintiff did not move for class action determination as required by Rule 11A of the Civil Rules of the Southern District.

4. Failure to State a Claim Against Defendants Beame and Goldin

Plaintiff claims that defendants Beame and Goldin are properly defendants in this action. The former, as Mayor of the City of New York, exercises "all the powers vested in the City, except as otherwise provided by law." Charter of the City of New York, § 8. The latter, as Comptroller of the City of New York, has the power "to settle and adjust all claims in favor of or against the City." Charter, § 93.d Plaintiff seems to claim that these sections of the Charter and the interest of defendants Beame and Goldin in maximizing revenue show that they are responsible for the enforcement by the PVB of the default judgments against violators. The only evidence presented by plaintiff consists of copies of newspaper articles describing the large amounts of money owed to and collected by the PVB and the City from violators.

The law is clear: where money damages are sought under § 1983, plaintiff has the burden to show that the defendant was personally responsible for the unlawful conduct. *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir. 1973); *Richardson v. Snow*, 340 F.Supp. 1261, 1262 (D.Md. 1972) The same authorities make it clear that liability under § 1983 may not be asserted

against a named defendant simply because that defendant is the employer or supervisor of an offending official. Plaintiff's attorney himself states that "Messrs. Beame and Goldin had no visible responsibility or involvement in the rendering or entering of all or most of the judgments against plaintiff". Affidavit in opposition of Carl E. Person, annexed to affidavit by plaintiff (filed January 30, 1975), pp. 9-10 Its procedures were established by act of the New York Legislature; its operation is supervised by its director, defendant Hinkson. Veh. & Traff. Law §§ 236.2, 237.3 Plaintiff does not clarify the scope of the authority, if any, of the mayor or comptroller over the PVB or the Department of Transportation.

The complaint therefore fails to state a claim against defendants Beame and Goldin.

5. Validity of PVB Judgments

a. The rendering of judgments after lapse of two-year statutory period

This aspect of the first count fails to state a claim because it is factually inaccurate. The Court has inspected the computer printouts of the PVB dated August 13, 1971, November 22, 1972, and December 5, 1973, all filed by the Clerk of the Civil Court. See section 2 above. It is not disputed that these records as a whole show all default judgments, whether or not paid, rendered against plaintiff since the inception of the operations of the PVB on July 1, 1970 up to the date of the filing of the complaint.

These records show that every default judgment rendered against plaintiff was done so within the prescribed period. This can be ascertained from the face of the computer printouts by comparing the date of issuance of the summons with the date of filing of the default judgment. This comparison is generous to plaintiff since the statutory period runs from the date of the required appearance or plea, N.Y.C. Admin. Code § 883a-7.0(b), which date is seven days after the issuance of the summons. Furthermore, the date of filing of every default judgment is within the prescribed period; a fortiori, the date of rendering by the PVB is within the prescribed period.

Plaintiff also claims that the entry of a default judgment may not be done more than one year after the default. CPLR § 3215(c) See plaintiff's memorandum of law in opposition, pp. 6-7. This argument incorrectly assumes that the CPLR governs the procedures of the PVB; the Vehicle and Traffic Law (§ 241.2) sets the relevant period. See CPLR § 101

b. PVB judgments are "non-existent"

This second aspect of the first count relates to plaintiff's claim that he has been deprived of due process of law because he was not able to locate the place of filing of judgments against him and therefore he is denied access to public records (the judgments) which serve as the basis for the issuance of executions against his personal property. By extensive affidavits, plaintiff has detailed his efforts to find the actual judgments outstanding against him. He has clearly demonstrated the bureaucratic

confusion in the Civil Court and the PVB, but the copies of PVB judgments submitted to the Court by defendants' counsel all indicate that they had been filed with the Clerk of the Civil Court. The affidavit of Thomas Dean, a clerk of the Civil Court, states that an annex of the Civil Court has been established at 51 Chambers Street in New York City and is clearly marked. The affidavit of Eugene St. Louis, an employee of counsel for the plaintiff, describes this office as a place of great chaos, but the deponent was able to secure access to books of past judgment registers and of current printouts. Thus, there is no question that a violator may ascertain the current status of summons which have been issued against him, and has access to the record of all judgments entered against him.

c. Default judgments of Administrative Agency not valid because not judgments of a New York Court

In open Court and in the memorandum of law in opposition to defendants' motion to dismiss, p.4 and following, plaintiff has argued that the default judgments are not enforceable because the PVB, an administrative agency, cannot create a "judgment" nor can it "enter" a judgment within the meaning of the CPLR. See §§ 5011 and 5016 The argument implies that the PVB cannot create valid default judgments by recording the defaults of violators with the Clerk of the Civil Court, but must apply to a judge of the Civil Court for the entry of a default judgment. Plaintiff argues that the authorization given to the PVB "to enter judgments", N.Y.C. Admin. Code § 883a-3.c(e), means that the judgments so entered must in form and content conform to the requirements of the CPLR.

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In fact the method used by the PVB does substantially conform to the directives of the CPLR, although records are not transcribed by hand but by computer. The computer printout which serves as the judgment does "recite the default upon which it is based", CPLR § 5011, by references to the number of the summons, the date of its issuance, etc. as set forth in section 3 above. The computer printout is filed by the Clerk of the Civil Court. CPLR § 5016 It provides a record of the parties, the nature of the dispute, and the amount of the violator's liability, and thus serves the purpose of a judgment roll. See 5 Weinstein Korn & Miller, para 5011.4 The New York Legislature clearly authorized the present PVB procedure: "Judgments sustaining or dismissing charges shall be entered on a judgment roll maintained by the bureau together with records showing payment and non-payment of penalties." N.Y.C. Admin. Code § 883a-7.0(a) This latter governs the procedures of the PVB rather than the CPLR. CPLR § 101 The assertion that a discrepancy between the two statutes means that Article 2-B of the Vehicle and Traffic Law is unconstitutional is not ground for a due process challenge to the latter.

Plaintiff also argues that the PVB does not comply with the requirement of the CPLR that the applicant for a default judgment file a proof of service of the summons or complaint before the Clerk enters the default judgment. CPLR § 3215(e) It is open to question whether the PVB is an "applicant" within the meaning of that section of the CPLR, given the power of the PVB to enter judgments itself. N.Y.C. Admin. Code §§ 883a-3.0(e) and 883a-7.0(a) In any event, it is clear from the record

that plaintiff had notice and knowledge that he was a violator and that he was in default. See complaint, p. 12, para 23 It is important to note that plaintiff neither in the first or the fourth count avers that the PVB lacked personal jurisdiction over him because of the inadequacy of service of process. Compare *Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971)

Plaintiff has also raised an issue regarding the constitutional sufficiency of the procedures of the PVB for the enforcement of its default judgments. Plaintiff rehearses a convoluted set of facts which purport to show, in substance, that the PVB procedures may result in the issuance of an execution from the Civil Court and levy by a marshal, even though the defaulting violator has paid the amount of the judgment. See supplemental affidavit by plaintiff and reply affidavit of plaintiff's counsel (It is difficult to relate this averment to the complaint. The first count alleges that the PVB judgments are "non-existent" as a matter of fact and are "non-enforceable" as a matter of law because they are not "judgments". Plaintiff's argument by way of his affidavits seems to be that the manner of enforcement of default judgments by the PVB is constitutionally defective.)

Plaintiff first argues that a payment of $525 made by him on February 28, 1972 in satisfaction of 27 judgments should have been credited by the PVB to amounts which it subsequently sought to collect from him. Reply affidavit of plaintiff's counsel, p.2, supplemental affidavit by plaintiff, p.1; affidavit of defendants' counsel However, this payment was of judgments entered by the Criminal Court of the City of New York and

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related to summons issued prior to July 30, 1970, the date that the PVB commenced operation.

Plaintiff next argues that the PVB has attempted to collect twice on its own judgments. Sometime in July or August 1972 a marshal (Bruce Kemp) of the City of New York sent an undated form of notice to plaintiff advising him that the Civil Court had issued an execution against his personal property because plaintiff owed $470 to the PVB, the judgment creditor named on the form. Affidavit by plaintiff, Exhibit A [The 11 money judgments aggregating $470 are listed in Exhibit C of the supplemental affidavit by plaintiff, p.3, which is a printout which plaintiff apparently obtained from the marshal.]

Between August 15, 1972 and February 5, 1974, plaintiff paid the $470; the marshal apparently did not levy on plaintiff's personal property. Supplemental Affidavit by plaintiff, pp. 2-3 In January 1973, the state Department of Motor Vehicles informed plaintiff that his vehicle registration would not be renewed because plaintiff had more than three unpaid judgments outstanding against him. Supplemental affidavit by plaintiff, p.3 Plaintiff thereupon requested and received from the PVB office in Brooklyn (at 44 Court Street) a computer printout dated December 20, 1972 (the December 20, 1972 list), which showed that outstanding against plaintiff were 45 default judgments of an aggregate amount of $2030. Supplemental affidavit by plaintiff, p. 3 and Exhibit D Plaintiff avers that 8 of the 11 money judgments which were the basis of the marshal's pre-levy notice were also listed on the December 20, 1972 list. Thus,

plaintiff argues that in order to obtain renewal of his vehicle registration he was required to pay those 8 money judgments twice, once to the marshal and once as part of the amount to be paid in satisfaction of the $2030.

The record does not show, however, that plaintiff had in fact paid these 8 judgments prior to the time in January 1973 when he received the December 20, 1972 list. The receipts given by the marshal to plaintiff show that prior to January 1973 plaintiff had paid $175. Of the 11 judgments being enforced by the marshal, the 3 which do not appear on the December 20, 1972 list (presumably because they were paid) aggregate $110. It is possible that the difference of $65 between $175 and $110 represents a payment by plaintiff not recorded on the December 20, 1972 list. But this discrepancy does not give rise to a constitutional claim. Plaintiff did not pay any part of the $2030 owed on default judgments not in dispute, and therefore the apparent non-renewal of his vehicle registration was proper because there were some outstanding and unpaid default judgments in the $2030 amount, even if it be assumed that plaintiff had paid one or more judgments included in that $2030 sum.

By notice dated September 9, 1974, the American Creditors Bureau, a collection agency, informed plaintiff that the PVB had obtained judgments against plaintiff. Affidavit of plaintiff, Exhibit A Plaintiff implies that he did not know to what judgments the collection agency was referring: "I . . . inquired as to the alleged judgments". Affidavit of plaintiff, p.2 In response

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to his inquiry, plaintiff was apparently sent a copy (supplemental affidavit of plaintiff, Exhibit C) of a computer printout similar to the "Summons Status" printouts maintained by the PVB (see section 2 above). The printout which plaintiff received from the collection agent contains the same judgments as the "Summons Status" dated December 9, 1974. The printout listed the judgments against plaintiff, showed that their sum was $1980, and bore a handwritten note of the collection agent to plaintiff advising the latter to contact him immediately. Plaintiff apparently was told orally where the computer printout had been docketed. (His inability to find the location of the docketed judgment printout was treated in section 5b above.) Of the eleven judgments which the return filed by the marshal (supplemental affidavit of plaintiff, Exhibit E) shows that plaintiff had fully paid, one appears on the printout dated December 9, 1974 which was furnished to plaintiff by the collection agent. It relates to summons number 120195762 issued on November 10, 1970. The marshal's filed return shows that this judgment was fully paid; the printout received from the collection agent by plaintiff shows that this same summons was only partially paid ($15 out of $40).

It is plaintiff's contention that the above facts show that the PVB's procedures can result in the deprivation of a defaulting violator's property without due process of law. After the computer generates a printout showing unpaid judgments, a violator may pay the amount due before the PVB or a collection agency demands payment. The printout which serves as the judgment will not reflect payment until the next printout is

generated one month later. See section 2 above. Plaintiff will have a receipt from the marshal or from the collection agency, but the docket — the latest computer printout filed by the Clerk of the Civil Court — will not reflect this payment. By contrast, a debtor on a judgment entered in a New York court has a right to the execution and filing by the judgment creditor of a satisfaction piece within a period of 20 days if the judgment is fully satisfied. CPLR §§ 5020 and 5021 This Court is not convinced that the difference between the filing of a satisfaction piece within twenty days of the date of satisfaction of the judgments by the judgment debtor and the monthly filing by the PVB of a computer printout on which paid judgments have been deleted is a difference of constitutional significance. Furthermore it does not appear from the evidence that plaintiff was harmed by the procedures of the PVB. Plaintiff has not paid any default judgment as to which he claims that he did not commit a parking violation or did not default. As a defaulter, plaintiff has been accorded due process by the administrative scheme embodied in the Vehicle and Traffic Law and the N.Y.C. Admin. Code. The PVB adequately ensures against the double collection of judgments; there is no showing that a defendant has collected twice on the same judgment.

The conclusion of the Court is that the statutory scheme and its implementation by the PVB accord plaintiff the due process required by the Fourteenth Amendment, having in mind a balancing of the state and private interests. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)

Even if it were found that plaintiff had shown some evidence of a deprivation amounting to a denial of due process, the multiplicity of technical questions arising as to the requirements of New York law for the form, content and timing of the entry of judgments by state courts make this case uniquely appropriate for abstention by a federal district court. See *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973)

6. Imposition of Penalties on Defaulting Violators

Plaintiff avers in his third count that the assessment of penalties against a defaulting violator constitutes a denial of his right to equal protection, his right not to be deprived of his property with due process of law, and his right not to have excessive fines levied against him.

Plaintiff's equal protection claim is frivolous. He has admittedly defaulted and cannot claim a right to be treated as if he had appeared and been found after a hearing to have committed a parking violation. Cases cited by plaintiff (by way of copies of law review articles) deal with state laws which result in the imposition of a greater fine on those who are convicted after trial than on those who plead guilty. Plaintiff did neither.

It is possible under the applicable law that a penalty for a default may in a given case be greater in amount than the fine provided for the violation itself. It does not appear how the PVB calculates the amount of the penalties. In his memorandum in support of motion for convening of three-judge court (p.11)

plaintiff states that the amount of the penalty depends on the length of delay in payment of the fine by a defaulting violator. Apparently, a penalty of $5 is assessed upon mailing of the first notice of default and a penalty of $15 is assessed upon the mailing of the second notice. See 7 Col. J. of Law & Soc. Prob. 448 (1971) [copy annexed to plaintiff's affidavit in support of motion for convening of three-judge court]

The policies of the PVB for the assessment of penalties on defaulting violators, adopted pursuant to the Vehicle and Traffic Law, are subject to a limited scrutiny when challenged as violating the Equal Protection Clause. The evaluation by this Court is to ensure that there is a "rational relationship to a [permissible] state objective". *Village of Belle Terre v. Boras*, 416 U.S.1, 8 (1974) quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) Here the penalty which may be assessed, when added to the underlying fine, cannot exceed $50. N.Y.C. Admin. Code 5 883a-3.0(b) The state has a valid objective to encourage violators to make timely appearances and payments. The large number of defaulting violators creates an administrative burden which causes an injury to the public.

The contention that an administrative body may not make determinations which affect a person's property is also frivolous. See *Magnolia Petrolium Co. v. Hunt*, 320 U.S. 430 (1943); *Lloyd Sabavdo Societa v. Elting*, 287 U.S. 329 (1932)

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7. Constitutionality of PVB's Hearing Procedures

As stated in section 3 above, the gist of the fourth count of the complaint is that the administrative decisions of the PVB are "given the effect of judicial judgments . . . without the safeguards provided by the courts of New York State and New York City . . ." . All of its decisions and judgments are therefore said to be null and void.

Plaintiff fires a broadside of 16 alleged defects in the procedures set forth by state statute for PVB hearings. See plaintiff's memorandum of law in support of motion for convening of three-judge court, pp. 13-16 Plaintiff, however, has not been injured by the PVB's hearing procedures because he has never been subject to them. He deliberately bypassed these procedures and chose to default. He does not claim that he did not receive notice of the parking violation summonses or the notices of rendering of a default. Plaintiff may not attack an entire administrative framework, whether or not applicable to his case. *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1042-43 (9th Cir. 1973) and cases cited therein. In any event, plaintiff's argument that the hearing procedures of the PVB are constitutionally deficient merely because they do not conform to those of the state courts is without merit. It is fundamental that due process does not mandate that an administrative agency follow any particular procedure. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); compare *Escalera v. New York City Housing Authority*, 425 F.2d 853, 866 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970)

Had plaintiff pleaded not guilty and had a fine been levied after hearing, and had plaintiff then failed to pursue his Article

78 remedy, this would of course be a different case. See *Lombard v. Board of Education of the City of New York*, 502 F.2d 631, 636, *cert. denied*, ——U.S.—— (March 17, 1975) Since plaintiff did not appear before a PVB hearing examiner, he has simply not been caused any deprivation by the hearing procedures. 42 U.S.C. §1983 His claims as to the deficiencies in the PVB's procedures for the enforcement of default judgments have been considered in section 5 above. "We shall need much clearer directions than the Court has yet given or, we believe, will give, before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction." *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969) (Friendly, J.) *cert. denied*, 400 U.S. 841 (1970)

Plaintiff urges, memorandum in support of motion for convening of three-judge court, p.2 and following, that the lack of a jury trial in a state court deprives him of federal constitutional rights. It has never been held that the right to a jury trial in civil actions is an element of due process applicable to state courts through the Fourteenth Amendment. *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1973); *New York Central R.R. Co. v. White*, 243 U.S. 188, 207-08 (1916) Trial by jury in civil actions in state courts may be modified or abolished altogether. *Oleson v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957). Thus plaintiff, assuming he has standing to raise the claim, has been deprived of no federal constitutional right by the absence of provision for a jury trial in

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the Vehicle and Traffic Law. Whether that law is consistent with the New York Constitution is irrelevant.

8. Fraud

The second count avers that the defendant represented to plaintiff that PVB judgments were legally enforceable while defendant knew that such judgments were not legally enforceable. The claim is frivolous. New York law requires that the pleader show the misrepresentation of a material fact, its falsity, scienter, reliance, and injury. *Sabo v. Delman,* 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957); *Jo Ann Holmes at Bellmore, Inc. v. Dworetz,* 25 N.Y.2d 112, 302 N.Y.S.2d 799 (1969) Here there is no evidence which colorably shows that defendant made any representation or reckless omission to plaintiff or that defendant had the requisite scienter.

Plaintiff has styled the complaint a class action, and prior to a court's determination whether an action may be maintained as a class action, it normally is presumed to be one. 38 Moore's Federal Practice (2d ed.), p.23-1103 However, because of plaintiff's failure to move for class action determination and because the facts alleged are unique to plaintiff, the class action allegations have not been considered. See *Mintz v. Mathers Fund, Inc.,* 453 F.2d 495 (7th Cir. 1972), compare *Dolgow v. Anderson,* 53 F.R.D. 664, 667 (E.D.N.Y. 1971), *aff'd,* 464 F.2d 437 (2d Cir. 1972) This action has not been pending very long and there can be no conceivable prejudice to any other person who may wish to assert a claim similar to that of plaintiff.

Appendix A — Opinion of the United States District Court For the Southern District of New York

Defendants' motion for summary judgment is granted because there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law, as indicated in sections 4 - 8 above. Thus all the counts of the complaint are dismissed as to all defendants.

Plaintiff's motion for an order convening a three-judge court is denied, because the constitutional claims stated in the complaint are not substantial. *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Nieves v. Oswald*, 477 F.2d 1109, 1111-12 (2d Cir. 1973).

The Clerk is directed to enter judgment in favor of defendants dismissing the action.

SO ORDERED.

Dated: New York, New York
April 3, 1975

INZER B. WYATT
United States District Judge

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APPENDIX B — JUDGMENT OF COURT OF APPEALS AFFIRMING OPINION OF DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of November one thousand nine hundred and seventy-five

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WALTER R. MANSFIELD

HONORABLE MURRAY I. GURFEIN

Circuit Judges,

PETER V. KEILEY,

Plaintiff-Appellant,

-against-

ELBERT HINKSON, etc., et al.,

Defendants-Appellees.

Appendix B — Judgment of Court of Appeals Affirming Opinion of District Court

No. 75-7226

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Wyatt, dated April 3, 1975.

s/ Wilfred Feinberg

s/ Walter R. Mansfield

s/ Murray I. Gurfein
U.S.C.JJ.

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APPENDIX C — MEMORANDUM OF ADMINISTRATIVE JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK

No. 208

DIRECTIVE TO JUDGES AND CLERKS

RE: MOTIONS PERTAINING TO PARKING VIOLATIONS BUREAU (PVB)

Orders to show cause concerning any judgment sought or obtained by the Parking Violations Bureau (PVB) shall not be signed. This Court does not possess the underlying records of the PVB, and therefore is not in a position to judge the truth or falsity of the averments made in the moving papers.

PVB procedure regulates its own motions, and counsel should be advised to make such motions returnable at the Parking Violations Bureau, 475 Park Avenue South, New York, N.Y. 10016. Such motions will be heard before a PVB hearing officer.

The law provides for an administrative review by an appeals board of the PVB consisting of three or more members. Judicial review of the final determination of the appeals board may be sought in the Supreme Court pursuant to Article 78 of the CPLR.

For more detailed data regarding the foregoing, you are referred to Article 2B of the Vehicle and Traffic Law, Secs. 235-

Appendix C — Memorandum of Administrative Judge of the Civil Court of the City of New York

244, ("Adjudication of Parking Infractions"), as added by Chapter 715 of the Laws of 1972.

If a motion is brought in this court by ordinary notice of motion, it should be denied without prejudice and with leave to renew before the PVB.

Do not be misled by the fact that the papers presented to you may recite that the PVB judgment in question was or will be entered in the Civil Court. Such entry is pro forma and only designed to allow levy and execution by City Marshals and for no other purpose. As such they are not judgments of this court.

EDWARD THOMPSON,
J.S.C.
Administrative Judge

Dated: August 31, 1972

SUPREME COURT

FILED
MAY 20 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1188

PETER V. KEILEY,

Petitioner,

vs.

ELBERT HINKSON, ABRAHAM D. BEAME and HARRISON J. GOLDIN,

Respondents.

MEMORANDUM IN OPPOSITON TO PETITION FOR A WRIT OF CERTIORARI

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Respondents
Municipal Building
New York, N.Y. 10007
(212) 566-4337

MURRAY L. LEWIS,
of Counsel.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

PETER V. KEILEY,

Petitioner,

vs.

ELBERT HINKSON, ABRAHAM D. BEAME and HARRISON J. GOLDIN,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, in attempting to obtain the grant of a Writ of Certiorari raises an issue that was not urged or argued either in the District Court or Court of Appeals. This issue, in fact, though, is non-existent.

Petitioner, relying on Tumey v. Ohio, 273 U.S. 510 (1927), and Ward v. Village of

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Monroeville, 409 U.S. 57 (1972), contends that the New York City Parking Violation Bureau (PVB) is a "profit-making business" having the "statutory duty of raising revenues" (petition, p. 2). Thus, relying on facts not alleged below, petitioner contends that he was denied due process because PVB had a "substantial pecuniary interest" in levying fines. (petition, p. 26).

In both the Tumey and Ward cases, this Court held there was a denial of due process because the mayor of the town was the "judge". In Tumey, the mayor actually received a fee for each individual found guilty of an offense. In Ward, the mayor had the responsibility for producing revenue. Neither situation exists here.

The PVB serves no executive or legislative function within the City government. Its sole function is to adjudicate traffic infractions which constitute a parking violation. New York Vehicle and Traffic Law §236. Therefore, the fact that PVB personnel are paid by the City which receives the fines, does not constitute a denial of due process. Dugan v. Ohio, 277 U.S. 61 (1928).

The procedure followed by the PVB is described in the opinion of the district court herein. See petitioner's Appendix, pp. 4a-9a. To the extent that petitioner, who has elected to default on the summonses he complains of (id. at 3a), may be heard to complain, under Ward and Tumey, of PVB'S hearing procedures, we believe it is enough to note that the PVB hearing examiners have no

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executive responsibilities, and in fact are nothing more than administrative law "judges", no more involved in the City's budgetary processes than the judges of the courts. In the words of Tumey, as quoted in Ward, such a hearing officer's situation is not one "which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused...." 409 U.S. at 60.

Additionally, the increased fine imposed on "scofflaws" does not raise a constitutional question as is seemingly urged by petitioner. Cf. Masden v. Massachusetts, 377 U.S. 407 (1964), reh. den. 379 U.S. 871.

CONCLUSION

THE PETITION SHOULD BE DENIED.

May 5, 1976.

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for respondents.

MURRAY L. LEWIS,
Of Counsel.

In The

MAY 17 1976

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-1188

PETER V. KEILEY,

Petitioner,

vs.

ELBERT HINKSON, ABRAHAM D. BEAME and HARRISON J. GOLDIN,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

CARL E. PERSON and
WALTER C. REID
Attorneys for Petitioner
c/o Carl E. Person
132 Nassau Street
New York, New York 10038
(212) 349-4616

(9237)

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Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

This supplemental brief and reply by petitioner, under subparagraphs 4 and 5 of Rule 24 of the Rules of the Supreme Court, is necessary to refute respondents' desperate assertion that petitioner neither pleaded nor briefed in the courts below the revenue Questions Presented to the Supreme Court by

petitioner, and to raise new matter material to resolution of the issues presented. The revenue issues were pleaded and briefed in both courts below but the respondents and courts chose to ignore the claims and arguments. In fact, respondents once again fail to meet the underlying revenue issue (Question Presented No. 2), as well as Judge Thompson's memorandum barring petitioner's access to the courts concerning the alleged "judgments", and other matters raised below and in the petition.

I.

Paragraph 27 of the amended complaint (pp. 13-14 of the Appendix in the Second Circuit) raises the revenue issue as follows:

> "27. The New York Vehicle and Traffic Law and Chapter 40 of the New York City Administrative Code, both enacted by the New York State Legislature, establishing the New York City Parking Violations Bureau removed parking violation hearings and appeals from the courts of New York to the Parking Violations Bureau, an administrative body, whereby the right to trial by jury, the rules of evidence in the conduct of hearings and appeals, affidavits of military service and other procedural safeguards were eliminated or denied to alleged parking violators, for the alleged purpose of 'streamlining' the administration of parking-violation 'justice.' Actually, defendants are using a quasi-criminal process to raise substantial amounts of revenue for New York City and placing the burden of this unconstitutional scheme of taxation on the persons who can least afford to pay."

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In petitioner's "Memorandum in Support of Motion for Convening of Three-Judge Court," dated January 21, 1975 (Doc. No. 9 in Index to Record), petitioner specifically identified (at p. 2) the revenue issue as a primary issue in this litigation, as follows:

> "(1) the raising of tens or hundreds of millions of dollars of revenue for New York City after payment of expenses relating to enforcement of parking laws, thereby making the statutes revenue statutes without the necessary legislative approvals. . . ."

Also, in the memorandum at pp. 9-11, petitioner discussed revenue under the heading:

> "AUTHORIZING THE ASSESSMENT OF ADDITIONAL 'PENALTIES' OR 'FEES' IN THE EVENT OF NON-PAYMENT OR DELAYED PAYMENT OF THE FINES FOR A PARKING VIOLATION WITHOUT LEGISLATIVE STANDARDS FOR ESTABLISHING THE AMOUNT OF THE PENALTIES OR FEES AUTHORIZES THE RAISING OF REVENUES UNDER THE POLICE POWER OF NEW YORK STATE IN VIOLATION OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION."

Also, in the memorandum at pp. 11-12, petitioner discussed revenue under the heading:

> "AUTHORIZING THE ASSESSMENT OF ADDITIONAL PENALTIES OR FEES FOR NON-PAYMENT OR DELAYED PAYMENT OF PARKING FINES IS (1) A DENIAL OF EQUAL PROTECTION OF THE LAWS; (2) THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW; AND (3) IMPOSITION OF EXCESSIVE FINES."

Also, at pp. 13-14, petitioner raised the issue again under a listing of alleged "Constitutional Defects" in the New York statutes, as follows:

> "[Par. 2] Revenues of Bureau are not used to pay expenses of Bureau. A revenue statute in violation of N.Y.S. Constitution; and use of police power to raise revenues, a denial of due process. 'Amounts available by appropriation' shows revenues are unrelated to expenses.
>
> [Par. 6] Remits all fines and penalties to financial administrator; shows revenue raising unrelated to cost of administration of Bureau; see Par. 2 above."

Also, at p. 20, petitioner discussed the following revenue issue:

> "THE TWO STATUTES ARE AN UNCONSTITUTIONAL MEANS FOR NEW YORK CITY TO RAISE SUBSTANTIAL REVENUES."

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Respondents did not meet any of these revenue issues in the District Court and District Judge Wyatt failed to mention specifically any of the revenue issues in his opinion.

In petitioner's brief in the Second Circuit, petitioner raised the revenue issue at various points, as follows:

> "STATEMENT OF THE ISSUES PRESENTED
>
> 3. Is the issue of whether the stepped-up penalties assessed against a car owner for delayed payment of a traffic ticket a substantial issue under the Equal Protection Clause or Due Process Clause of the 14th Amendment to the United States Constitution? (p. 1).
>
> 4. Is the issue of whether a state or local government may raise substantial revenues (after related expenses) under a police power a substantial issue under the Due Process Clause of the 14th Amendment to the United States Constitution? (p. 2).
>
> . . . Also, plaintiff claims that the PVB's raising of revenues for New York City in substantial excess over related expenses is an unconstitutional application of the statutes granting the PVB the police power to regulate parking. (p. 11).

. . . In addition, the court below erred by rendering a final judgment based on conflicting affidavits involving controlling facts, without affording plaintiff an opportunity for discovery or an opportunity to offer additional evidence at an evidentiary hearing. (p. 12).

Finally, plaintiff will show that the application of the two statutes is unconstitutional because the New York municipalities are using the statutes to raise substantial revenues (after related expenses) under the police power, in violation of the Due Process Clause of the 14th Amendment. The difference between a small-town motorist trap where the mayor presides as the police justice and the existing situation in New York City and other cities in New York State is difficult if not impossible to perceive. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), quoting *Tumey v. Ohio*, 273 U.S. 510 (1927). (p. 13).

. . . See also *Ward v. Village of Monroeville, supra; Tumey v. Ohio, supra* . . . (p. 18).

USING A POLICE POWER TO RAISE SUBSTANTIAL REVENUES IS A DENIAL OF DUE PROCESS UNDER THE 14th AMENDMENT

The assessment and collection of fines and penalties can be the proper exercise of the police

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power of the state. But it can also be a means of taxation, when the amount raised through the assessment and collection of fines and penalties bears no reasonable relationship to the cost of enforcement of the police power in question. See *Automobile Club of Missouri v. St. Louis,* 334 S. W. 2d 355, 83 A.L.R. 2d 612 (1960) and *Matter of Freidus v. Leary* , 66 Misc. 2d 70 (Spec. Term, N.Y. Co. 1971), *reversed on other grounds,* 38 A.D. 2d 919 (1972), *aff'd* 32 N.Y. 2d 869 (1973), relating to the $75 penalty assessed for the towing of illegally-parked automobiles by New York City. The court said in part:

'The penalty cannot . . . be raised arbitrarily to whatever figure would discourage the brashest and most foolhardy parker. "Excessive fines" are constitutionally prohibited (U.S. Const., 8th Amdt.; N.Y. Const., art. I, §5). A maximum fine is set for traffic infractions and parking violations. (Vehicle and Traffic Law, §1800; New York City Charter, §883, subd. (a); Administrative Code of City of N.Y., §883a-3.0, subd. b). The actual parking fine which can be imposed is limited by law. The question posed in this case is whether the additional $50 charged for an illegally parked vehicle, beyond the stated fine, is, in fact, a penalty in disguise, imposed by the city beyond its authorized powers and to evade the limitation, or whether it is a reasonable charge for the actual expenses of removal of a vehicle blocking its streets.' 66 Misc. 2d 72.

By allowing the PVB to establish fines and penalties without being limited to an approximation of the expenditures in enforcement and collection, the statutes authorize the raising of revenues by New York City and other cities throughout the state. This is a power to tax. See discussion in 'The Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers', 49 Tulane L. R. 117, n. 126 (1974).

The use of a police power as a taxing device is a denial of due process in the taking of the property of the parking-law violators, because it has no reasonable relationship to the exercise of the police power. Furthermore, the stepped-up penalties or fees cannot be related to the enforcement of the police power because the parking offense has been terminated days or weeks before assessment of the stepped-up penalty or fee. See cases cited in the annotation to *Automobile Club of Missouri v. St. Louis*, 334 S.W. 2d 355, 83 A.L.R. 2d 612 (1960). (pp. 24-25).

In *Marder v. Massachusetts*, 377 U.S. 407 (1964), the Supreme Court said there was no substantial federal question when a statute permitted an alleged violator of parking laws to elect to be treated under a civil or a criminal procedure. . . . But this *Marder* case is totally inapposite to the issues involving plaintiff. . . .

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> Yet, the New York City PVB is extracting the higher (criminal) penalties and fines in its unconstitutional scheme of taxation and revenue raising." (p. 30).

Respondents did not meet any of these revenue issues in their brief in the Second Circuit, and the Second Circuit also ducked these obviously troublesome revenue issues by affirming the judgment of the District Court on the opinion of Judge Wyatt.

II.

Respondents argue that the petitioner "elected" to default on the summonses in question. This is not the basis for petitioner's complaint. Petitioner believed he had paid at least some of the alleged judgments in question and that he was being billed again for these same "judgments." He then tried to find out from the records in various Civil Courts in New York City exactly how much in outstanding parking ticket "judgments" he owed, but found out that these courts had no records underlying any of the "judgments" as to which petitioner was being required to pay, by threats from New York City marshals armed with purported "executions." At this time, petitioner tried to open up the alleged "judgments" in the court which purported to have entered the "judgments," and he was told (based on the memorandum by Administrative Judge Thompson) that he could not open up such "judgments" in the Civil Court. In fact, the memorandum stated that the "judgments" against petitioner were not in fact judgments of the Civil Court. Petitioner was directed by the Civil Court to return to the Parking Violations

Bureau, which demanded that he pay all of his outstanding "judgments" before he would be allowed to contest any of them, on the grounds of alleged prior payment. In fact, as the record shows, the petitioner was being billed twice as to some (but not all) of the parking ticket "judgments" in question (A124).

III.

Respondents are attempting to hide from the issues by claiming the respondents fall within the *Dugan* rationale, which case was distinguished in *Ward*. *Dugan* is totally inapposite, because the official had no executive responsibilities whatsoever. Petitioner in the instant proceeding has a different situation. He did not sue the persons who adjudicate parking tickets or who issued the parking tickets. Instead, he sued the New York City officials (Beame and Goldin) charged with the executive responsibility of raising revenue for New York City and their appointee (Hinkson, Director of the Parking Violations Bureau) who carries out the Beame administration policy of raising substantial revenues in excess of related expenses through a motorist trap operation (p. 4 of Memorandum of Law dated January 30, 1975 — Doc. No. 14 in Index to Record, A106; Par. 18 of the Amended Complaint, A11).

The extent of respondents' control over the judicial functions of the hearing examiners and various types of New York City employees who issue parking tickets was not obtained by petitioner in the District Court because the discovery sought by petitioner was denied. See excerpts from petitioner's request for documents in Point IV below.

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Petitioner is claiming that the Parking Violations Bureau and its officials are instrumentalities of defendants Mayor Beame and Comptroller Goldin and, to a lesser extent, of Elbert Hinkson, Director of the Parking Violations Bureau. Hinkson was appointed by the other defendants and holds office at their pleasure. He appoints the hearing officers, and enforces any parking ticket or conviction quotas (see Point IV) to accomplish the revenue-raising objective.

The revenue-raising objective of this instrumentality becomes crystal clear upon reading the following editorial in the April 17, 1976 edition of the New York *Daily News*, at p. 17:

"THE CAT'S OUT OF THE BAG

Many New Yorkers have been suspicious for a long time that the cops are on a ticket-writing, tow-away blitz. Those fears were confirmed Thursday by none other than First Deputy Mayor John Zuccotti.

The game plan goes like this: In order for 208 recently rehired cops to keep their jobs, the Police Department and the Beame administration worked out a deal that would soak motorists to the tune of $1 million between now and the end of the city's fiscal year on June 30.

The whole thing smacks of old-fashioned Southern speed traps. Enforcing the motor vehicle laws is one thing. But a cynically

> deliberate revenue-raising campaign is quite another. It is, to put it mildly, unconscionable."

The foregoing quotation and paragraph are offered as "intervening matter not available at the time of" petitioner's "last filing," under subdivision 5 of Rule 24 of the Rules of the Supreme Court. Respondents' reliance upon *Dugan* shows the existence of substantial federal questions relating to revenue-raising. Respondents' only argument concerns one of the two revenue-raising issues presented and is based on disputed facts concerning the responsibilities of the respondents.

IV.

Because of the improvident grant of summary judgment in the District Court below and affirmance in the Second Circuit, petitioner was not given the opportunity to obtain discovery of respondents, to ascertain the extent to which the hearing examiners of the Parking Violations Bureau and the persons who issue parking tickets are independent of respondents, and the extent to which net revenues are being raised through New York City's parking ticket business. Pursuant to a request to produce documents, dated December 23, 1974 (Doc. No. 7 in the Index to the Record), petitioner sought unsuccessfully to obtain documents relating to the foregoing issues, as follows:

> Documents evidencing or relating to:
>
> A. Collection procedures, including collection quotas or goals.

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C. Quotas or goals relating to the issuance of parking tickets.

D. Quotas or goals for hearing officers.

H. Studies of the cost of ticket issuance and other enforcement of the parking ticket laws, rules and regulations.

I. Studies or analyses of the costs of collection of parking ticket fines and/or penalties.

J. Statistics on the amount of fines and penalties assessed and/or collected.

K. Selection, appointment, removal, promotion and compensation of hearing officers, meter maids, policemen, sanitation personnel and others who issue parking tickets.

V. All instructions given to data processing personnel or companies relating to issuance of traffic tickets, collection, payment, registration of motor vehicles, scofflaw certification, liens on real property, and compilation of statistics on parking tickets.

W. Statistics, reports, studies and analyses of the disbursement of all fines and penalties and other payments collected or received by or on behalf of the Parking Violations Bureau.

Z. Studies or statistics relating to any revenues or profits attributable to issuance of parking tickets and or enforcement thereof.

AA. Any records or statistics relating to the cost of issuance or enforcement of parking tickets.

CC. Instructions or procedures relating to the issuance of parking tickets.

DD. Communications with employees of the Parking Violations Bureau, Police Department, Sanitation Department or any union representing any of such personnel regarding the amount of any revenues or profits earned by New York City with respect to issuance of parking tickets.

FF. Income from the investment of fines or penalties received by or on behalf of the Parking Violations Bureau of New York City.

GG. Studies or analyses on the revenues or profits produced by any categories of employees of the Parking Violations Bureau or other agency of New York City.

HH. Studies or analyses on the number of tickets issued by personnel of (a) Parking Violations Bureau; (b) police department personnel; (c) sanitation department personnel; and (d) any other New York City personnel.

JJ. Schedule of salaries.

NN. Statistics on the cost of appeals and/or Article 78 proceedings.

SS. All other by-laws, rules, regulations, manuals, memoranda, instructions or other documents relating to any practices, policies or procedures of the Parking Violations Bureau.

TT. Schedule of fines and penalties.

In light of the foregoing, it does not seem possible for respondents to argue, in good faith, that the constitutionality of revenue-raising by issuance of parking tickets was not raised by petitioner from the very inception of the action.

CONCLUSION

For the foregoing additional reasons, the petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Carl E. Person
s/ Walter C. Reid
Attorneys for Petitioner